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Supreme Court, U.S
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No. 04-479

IN THE
SUPREME COURT OF THE UNITED STATES

DONALD E. ARMSTRONG, POST-BANKRUPTCY PETITION AND AS A BENEFICIARY OF THE DONALD E. ARMSTRONG FAMILY TRUST AND THE DONALD E. ARMSTRONG CHARITABLE REMAINDER UNITRUST,
Petitioner

v.

ROGER G. SEGAL, AS TRUSTEE OF THE MOUNTAIN PACIFIC VENTURES, INC. et al.,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF IN SUPPPORT OF PETITION FOR A WRIT OF CERTIORARI

DONALD E. ARMSTRONG, PRO SE
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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Petitioner Donald E. Armstrong, individually and post-bankruptcy-petition and as a beneficiary of the Donald E. Armstrong Family Trust ("Family Trust") and the Donald E. Armstrong Charitable Remainder Unitrust ("Charitable Trust") (collectively the "Trusts") ("Armstrong") respectfully submits this Reply Brief in Support of Petition for a Writ of Certiorari to review one decision of the Tenth Circuit Court of Appeals.

PETITION QUESTIONS PRESENTED

1. Can a permanent injunction be moot preventing appellate review and be an unconstitutional denial of a party's access to the courts?

2. Can a bankruptcy court enjoin non-parties to a settlement—especially that have not been noticed of the bankruptcy proceedings and where the estate was fully liquidated?

3. Are interlocutory orders in dismissed cases based on F.R.C.P. 41(a) entitled to preclusive effect?

4. Can penalties of over $2.8M in relation to zero actual damages against non-debtors provide standing to an alleged creditor and are these penalties unconstitutionally excessive? Can any exemplary damages be awarded without an award of actual damages?

5. Can a bankruptcy plan of reorganization be approved based on paying all unsecured creditors when one unsecured creditor has not been paid

and that creditor was denied the right to a hearing?

PARTIES TO THE PROCEEDINGS

Roger G. Segal as Trustee of the Chapter 11 Bankruptcy Estate of Mountain Pacific Ventures, Inc.

Kenneth A. Rushton as Trustee of the Chapter 11 Bankruptcy Estate of Donald E. Armstrong

Steppes Apartments, Ltd.

John L. and Rosalie Feece

Donald E. Armstrong as Trustee of the Donald E. Armstrong Family Trust and Donald E. Armstrong Charitable Remainder Unitrust

Donald E. Armstrong, Post Bankruptcy Petition And As Beneficiary of the Donald E. Armstrong Family Trust and the Donald E. Armstrong Charitable Remainder Unitrust

TABLE OF CONTENTS

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI i

PETITION QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

STATEMENT 1

REASONS FOR GRANTING THE PETITION 2

1. THE LITIGATION INJUNCTION 5

2. THE TEXAS MODIFIED JUDGMENT 8

3. THE SUZUKI 9

CONCLUSION 9

TABLE OF AUTHORITIES

CASES

BMW of North America, Inc. v. Gore, 517 U.S. 559, 568, (1996) 10

In re Pritam Realty, Inc., 233 B.R. 619 (D. P.R. 1999) .. 3

In re Public Service Co. of New Hampshire, 963 F.2d 469, 471 (1st Cir. 1992) 3

In re Western Real Estate Fund Inc., 922 F.2d 592, 601 (10th Cir. 1990) 4, 5, 7

In re Zale Corp., 62 F.3d 746 (5th Cir. 1995) 6

SEC v. Drexel Burnham Lambert Group, 960 F.2d 285 (5th Cir. 1992) 6

State Farm Mut. Auto. Ins. Co. v. Campbell, 123 S.Ct. 1513, (U.S.,2003) 10

STATUTES

11 U.S.C. § 524 6

11 U.S.C. § 524(e) 4, 5, 9

11 U.S.C. § 726(a)(4) 4

11 U.S.C. § 1129 9

STATEMENT

First, Roger G. Segal ("Segal") confuses the issues and raises new issues rather than addressing Armstrong's issues. It is impossible for Armstrong to fully respond to all of Segal's allegations in ten pages.

As usual Segal principally attacks Armstrong personally and distorts the facts to avoid the issues. The first major discrepancy is that Segal asserts that Steppes Apartments, Ltd. ("Steppes") Texas Modified Judgment ("Judgment") was against Armstrong. The Judgment was against two trusts where Armstrong was the trustee and specifically excluded liability against Armstrong individually. (Petition at 29a--32a.)

There are numerous other blatant misrepresentations in Segal's opposition. Segal claims that the settlement with Steppes would have paid unsecured creditors in the Armstrong bankruptcy estate. There were no funds to pay unsecured creditors once the plan of reorganization was approved in the Armstrong estate. All of the assets of the Armstrong estate were used to pay attorneys. The ONLY reason for the plans of reorganization in both the MPV and the Armstrong bankruptcies was to obtain the Litigation Injunction ("Injunction"). (Opposition 32a—33a) It is simply a lie that any funds could have been paid to unsecured creditors in the Armstrong estate.

Segal acknowledges that the court found that Steppes' lis pendens were wrongful liens. Steppes continued these wrongful liens after the bankruptcies were filed and affected Armstrong post-bankruptcy petition. Armstrong's post-bankruptcy petition claims were not part of either estate and Armstrong has been denied the right to pursue Armstrong's post-bankruptcy petition claims through the Injunction. (*Opposition* at 2)

Segal outlines the Injunction and how it releases and protects non-debtors and enjoins numerous parties.

Most of these parties, including the Trusts, were never noticed and received no due process. (*Opposition* at 4) The Injunction is included in the Steppes' settlement where Armstrong, the Trusts and others were not parties. A settlement is a contract and cannot affect non-parties to the contract. **A bankruptcy plan of reorganization cannot create rights against non-parties especially without due process.**

Segal admits Steppes received no distribution from MPV. Segal fails to mention that Steppes had no right to a distribution since Steppes' alleged claim was disallowed in the September 7, 2001 Order subject to Steppes filing an amended claim that Steppes never filed. (*Petition* p. 41a) Despite Steppes having no claim in MPV, the essence of the MPV plan was to protect the Steppes' Parties. (*Opposition* at 4) Steppes was not the debtor or a claimant and yet received releases and protections in contradiction to Section 524(e).

Armstrong filed a proof of claim relating to the 1993 Suzuki ("Suzuki"). Segal filed an objection but a hearing was never held.

REASONS FOR GRANTING THE PETITION

Segal did not respond to Armstrong's Issues 2 and 3 illustrating that Segal has no objection to this Court granting Armstrong's Petition as to Issues 2 and 3 at the very least.

Permanent Injunctions can be vacated when the facts and circumstances change such as the MPV bankruptcy estate closing. Segal does not address the principal issue that a continuing and permanent injunction can never be moot. As long as the Injunction remains pending and effective it continues to affect Armstrong forever. If the MPV plan is moot there can be no permanent injunction and conversely if the Injunction remains effective the plan is not moot. This is simple. Segal claims that "virtually" every task is

complete. (*Opposition at* 15) If the MPV estate is "complete" there is no purpose for the Injunction. Once the MPV estate closes, there is no purpose for the Injunction EXCEPT to protect Steppes for post-bankruptcy petition issues that have no bearing on MPV.

Segal cites *In re Pritam Realty, Inc.*, 233 B.R. 619 (D. P.R. 1999). *Pritam* relates to a sale of property and not an injunction. Mootness in bankruptcy proceedings "is premised on jurisdictional and equitable considerations stemming from the impracticability of fashioning fair and effective judicial relief". *In re Public Service Co. of New Hampshire*, 963 F.2d 469, 471 (1st Cir. 1992) Clearly, it is inequitable and unfair to allow the permanent Injunction to remain in effect; and clearly, fair and effective judicial relief can be fashioned in eliminating the permanent injunction especially since it has absolutely no effect on the MPV estate.

Segal argues that the MPV estate could not be resolved because of the claims filed by Armstrong. This Court requires additional facts on this issue. Armstrong's claims were for the alleged $400,000.00 partnership interest that Armstrong transferred to MPV canceling the impact of this $400,000.00. The other claims were for the Suzuki and an Armstrong loan of approximately $60K to MPV. Rushton settled these claims proving they were no hindrance.

Contrary to Segal's assertions, all claims have not been paid in full as Segal did not pay Armstrong's unsecured claim for the Suzuki. There are two portions to the Suzuki claim—the secured portion and the unsecured portion. Whatever the value of the Suzuki at the time of confirmation can be subtracted from the claim of $7,315.90 plus interest leaving the unsecured claim for the balance that was never paid. It is true that Armstrong's retaining the Suzuki does resolve Armstrong's secured claim *but* does not resolve the

unsecured claim. Rushton stipulated on June 23, 2003 that the unsecured portion of the same Suzuki claim was $6,390.75. The unsecured claim was never paid or even addressed in the MPV case. To determine the unsecured claim only required a valuation of the Suzuki rather than surrender. In fact, surrendering the Suzuki would accomplish nothing in relation to valuing the vehicle. Armstrong had no funds to purchase a vehicle and surrendering the Suzuki eliminated Armstrong's only transportation. Segal's clear purpose was exactly that—to eliminate Armstrong's only transportation since there was no other purpose for surrendering the Suzuki.

What is the purpose of the Steppes' Settlement? Since Steppes no longer had any claim in MPV, how did Steppes even have standing? Segal and Rushton created Steppes' standing and granted Steppes releases and injunctions when Steppes could no longer affect the MPV estate. That is not the purpose of the Bankruptcy Code and it is important to all debtors and creditors for this Court to prevent the use of the bankruptcy courts to protect certain alleged creditors at the expense of debtors and other legitimate creditors. There is certainly no provision for this in the Bankruptcy Code. 11 U.S.C. § 524(e) *In re Western Real Estate Fund Inc.*, 922 F.2d 592, 601 (10th Cir. 1990) ("*Western*") There is a split among the circuits on this specific point as to whether Section 105(a) overcomes Section 524(e) that requires this Court's attention.

Segal argues that the unsecured creditors were paid in full as if that is some great accomplishment on Segal's part. Steppes' alleged claim was solely for Texas statutory penalties. All that Segal had to do was to convert the MPV case to Chapter 7 where penalties can be subordinated to other unsecured claims. 11 U.S.C. § 726(a)(4) Instead, Segal perpetuated the MPV estate solely to obtain the Injunction to protect Steppes thereby

holding the legitimate unsecured creditors funds for years. The unsecured creditors could, and should, have been paid in 2000 rather than 2002. Segal could easily have converted the case to Chapter 7, paid all unsecured creditors and returned a significant dividend to Armstrong. Instead, Segal continued the case while holding funds sufficient to pay the unsecured creditors generating hundreds of thousands in legal fees.

SEGAL WON AGAINST STEPPES AND YET STILL CREATED THE PLAN WITH THE PRIMARY PURPOSE OF PROTECTING STEPPES. THIS IS NOT THE PURPOSE OF THE BANKRUTPCY CODE AND IT IS IMPORTANT FOR THIS COURT TO STATE WHAT BANKRUPTCY COURTS CAN AND CAN'T DO IN THIS REGARD. (*Opposition* at 1--2)

1. THE LITIGATION INJUNCTION

Segal does not address the primary issue that the Bankruptcy Code does not support or authorize the Injunction. 11 U.S.C. § 524(e) *In re Western* Segal does not provide any legal authority that the bankruptcy court could release anyone but the debtor or enjoin non-parties. It is up to this Court to address this question—whether bankruptcy courts can protect non-debtors and/or non-parties. Why would Segal spend hundreds of thousands of dollars merely to protect Steppes when there is no benefit to the estate?

It is imperative that this Court write an opinion addressing who can be protected in bankruptcy court.

Segal first argues that vacating the Injunction would have no effect since the Injunction remains in the Armstrong Plan. That argument is a red herring and bears no consideration. If the Injunction is void it is void everywhere. Regardless of Rushton and Steppes desiring the Injunction, if there is no authority for the Injunction the courts cannot enter or enforce the Injunction. Steppes, Rushton and Segal can agree not to pursue each

other but they cannot mutually agree that some third party cannot pursue them especially for matters that do not relate to the bankruptcy estates. This is ludicrous and requires this Court's attention. The essence of this argument is that bankruptcy trustees can enter into any type of agreement they wish affecting anyone they want—without notice, due process, hearings or statutory authority.

Clearly, non-parties to a contract cannot be affected by a contract. Bankruptcy courts cannot alter this basic law through plans of reorganization. This Court must address this issue and provide guidance to the courts.

In fact, Congress addressed this issue in 11 U.S.C. § 524. Section 524(e) limits bankruptcy courts' ability to release anyone except debtors. Congress amended Section 524 in 1994 adding subsections g and h to address asbestos bankruptcies. Subsections g and h are very detailed and specific. Even assuming the instant Injunction related to asbestos claims, the Injunction would not stand since it does not comply with subsections g and h.

There is no continuing purpose for the Injunction. In fact, the Injunction requires the MPV and Armstrong bankruptcy estates to remain in existence forever.

Segal relies on *SEC v. Drexel Burnham Lambert Group*, 960 F.2d 285 (5th Cir. 1992) ("Drexel"). The same 5th circuit examined Drexel in 1995. *In re Zale Corp.*, 62 F.3d 746 (5th Cir. 1995) ("In those cases, however, the courts upheld permanent injunctions of third-party claims because while the injunction permanently enjoined the lawsuits, it also channeled those claims to allow recovery from separate assets and thereby avoided discharging the nondebtor.") This case can be distinguished from the MPV case. The MPV Injunction releases non-debtors, non-parties and non-

creditors with no benefit to the estate. Furthermore, the Tenth Circuit is clear that 11 U.S.C. § 105(a) does not provide authority to release non-debtors. *In re Western*

Segal argues that all these claims belong to MPV and Rushton. This is not about the estates' claims-it is about Armstrong's post-bankruptcy petition claims that have absolutely nothing to do with MPV or the Armstrong estate. Segal et al. complain about the estates' claims, but the truth is that they have denied Armstrong the right to Armstrong's own personal post bankruptcy petition claims. Steppes continues to threaten to sue Armstrong personally to collect the Judgment post-bankruptcy petition relying on the Injunction to prevent Armstrong from defending himself.

Segal argues that no stranger is released under the Plan. Steppes had no claim in MPV. Clearly all the Steppes' Parties are strangers to MPV and yet are protected by the Injunction. (*Opposition* at 32a)

Segal blatantly misrepresents the facts to this Court in footnote 4 in arguing that Steppes is enjoined from pursuing Armstrong because of Armstrong's discharge. The Steppes' Settlement specifically purports to allow Steppes to refile Steppes' nondischargeability complaint. (*See Petition* p. 66a)

Segal claims Armstrong has not articulated Armstrong's own claims. Armstrong is entitled to pursue Armstrong's own post-bankruptcy petition claims against Steppes and others that have nothing to do with MPV or the Armstrong estate. Steppes still claims to have post-bankruptcy petition claims against Armstrong and Steppes continued to affect Armstrong post-bankruptcy petition with the wrongful liens. These post-bankruptcy petition claims are Armstrong's personal property. At the very least, this Court is entitled to have all the facts relating to the new issues Segal presents.

The Injunction protects Steppes and others for all claims. If the MPV and Armstrong estates' are closed, Armstrong is procedurally prevented from any possibility of obtaining permission to pursue claims as no legal avenue will exist in order for Armstrong to obtain permission from the court, as outlined in the Injunction. Therefore, Armstrong is completely denied any opportunity to be heard.

An order that protects Steppes and others AND that has no relationship to MPV is not authorized by the Bankruptcy Code. It is critical that this Court resolve these questions about the extent of bankruptcy court jurisdiction and authority.

2. THE TEXAS MODIFIED JUDGMENT

All of Steppes' claims are based on the Judgment. Additionally, all this litigation stems from Steppes' efforts to reverse or ignore the provisions in the Judgment that preclude liability against Armstrong. Armstrong was not a party to the Texas Litigation and was specifically excluded from liability. (*See Petition* pgs. 29a--32a) It is Segal, Steppes and Rushton that ignore preclusion principles in attempting to make Armstrong, MPV or the Armstrong estate liable. It is the Trusts that appealed the Judgment through the legal system and not Armstrong. Armstrong is entitled to his own due process in relation to these issues. It is time for this Court to grant Armstrong's petition and review these penalties. Several principle issues have never been addressed because Armstrong, individually, was not a party to the Texas Litigation or the Judgment and the Texas courts did not address these issues claiming they were waived by the Trusts.

These issues are important to all parties being burdened with unconstitutionally excessive penalties especially in relation to zero actual damages. The facts of this case present the perfect opportunity for this Court

to address over $2.8M in penalties in relation to zero actual damages in a judgment that specifically excludes liability against the party being burdened with the penalties.

3. THE SUZUKI

The Bankruptcy Code provides means for approving a plan of reorganization. 11 U.S.C. § 1129 Segal allegedly relied on these provisions. However in Segal's efforts to ignore the law and punish Armstrong, Segal refused to pay Armstrong's unsecured claim of $6,390.75 and risk the MPV Plan. Segal knew this was not the law AND Segal knew the courts would do anything to punish Armstrong.

The truth is simple—Segal did not pay this one unsecured claim and therefore violated the Bankruptcy Code. The question for this Court is whether to allow courts to ignore the Bankruptcy Code to achieve whatever result the court wishes. This is a broad and powerful question this Court should address.

CONCLUSION

Underlying all the issues here is that parties representing themselves are continually denied notice, due process and the law. These facts present a perfect opportunity for this Court to confirm that pro se parties are entitled to the protections of the constitution and the law. To deny the petition is to confirm that parties representing themselves have no rights in our courts.

No permanent injunction is moot and Armstrong is entitled to review. The bankruptcy Court cannot enjoin non-debtors and non-parties especially relating to claims that have no relationship to the bankruptcy estate. Bankruptcy courts have no authority under 11 U.S.C. § 105(a) to release non-debtors and/or enjoin non-debtors. This is an open question requiring this Court's attention. At the very least, the Injunction must be modified so that it only protects MPV as the debtor. 11 U.S.C. § 524(e)

This Court should grant review to address the interplay between Sections 105(a) and 524(e) as to who bankruptcy courts can release, protect and/or enjoin.

Segal relies on interlocutory orders in cases that were dismissed for preclusive effect. Interlocutory orders, especially in cases that are voluntarily dismissed under F.R.C.P. 41(a), are not entitled to preclusive effect. This Court must address and confirm this issue to prevent further confusion such as in this case.

The MPV Plan's principal purpose is to protect Steppes from review of the $2.8M in penalties in the Judgment. Armstrong continues to be entitled to review of the Judgment penalties as long as the Injunction protects Steppes from such review. It is critical that this Court apply *BMW of North America, Inc. v. Gore,* 517 U.S. 559, 568, (1996) and *State Farm Mut. Auto. Ins. Co. v. Campbell,* 123 S.Ct. 1513, (U.S.,2003) tests to statutory penalties and address any penalties being awarded when zero actual damages are awarded.

Segal did not pay Armstrong's unsecured claim based on the Suzuki thereby raising the critical question of whether plans of reorganization can be approved without fully complying with the Bankruptcy Code. It is critical this Court address this question for all the bankruptcy cases in this country.

These questions are important since they have the potential to affect the thousands of bankruptcies filed every year.

The Petition for Writ of Certiorari should be granted.

Respectfully submitted.
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